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FILED
MAY 24 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 869

HERMAN SCHWABE, INC.,
Petitioner,

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent.

RESPONDENT'S BRIEF OPPOSING CERTIORARI

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May 16 1960.

Supreme Court of the United States

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HERMAN SCHWABE, INC., *Petitioner*, v. UNITED SHOE MACHINERY CORPORATION, *Respondent*.		No.

RESPONDENT'S BRIEF OPPOSING CERTIORARI

The petition states no ground under Rule 19 for allowance of the writ of certiorari in this case. The only two decisions of Federal courts of appeals on the construction of the four-year statute of limitations are in accord, not in conflict. No Federal question was decided below in a way in conflict with applicable decisions of this court. The accepted and usual course of judicial proceedings has not been departed from. While the proper construction of the Federal four-year statute of limitations is an important one, the construction adopted below is so clearly right that it need not be re-settled by this Court.

The Government antitrust case against United Shoe Machinery Corporation[1] was brought in December 1947 and ended with receipt of this Court's mandate June 23 1954. More than a year later, Congress on July 7 1955 amended[2] the Clayton Act to provide a uniform four year period of limitation for private antitrust cases. To allow a grace period in view of longer pre-existing State limitation statutes, Congress provided that the amendment should not take effect until January 7 1956.

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[1] *United States v. United Shoe Machinery Corporation* 110 F. Supp. 295 (D. Mass. 1953), aff'd 347 US 521.

[2] 69 Stat. 282-3; 15 USC §§ 15b, 16(b).

Question Presented

The six "questions" stated at pp. 2-3 of the petition are nothing more than variations of a single argument. The only question that can be derived from this record is:

> Is a private treble damage action which was filed 17 months after the effective date of the new Federal statute of limitations, 15 USC §§ 15-16, and almost three years after the conclusion of the related Government antitrust suit, barred with respect to claims accruing more than four years before its filing?

Argument

There are at least three compelling reasons why the Court of Appeals' opinion, 274 F. 2d 608, does not merit review here:

1. The question is not one which requires to be decided here for the purpose of settling the law in the future. Petitioner's argument on the "retroactivity" score could apply only in cases where the Government action was terminated before January 7 1956 (i.e. effective date of the four-year statute) *and* less than four years before filing of the private treble damage suit. But such a state of facts cannot recur in any case brought after January 7 1960. The same result follows if it be argued (cf. petition p. 8) that the amendment applies only to Government suits brought *after* it took effect. For more than the past four years it has been mathematically impossible for the Government either to commence or to terminate an action except after January 7 1956. Far from the question having any special or important significance, it is one which time itself erases for other cases.

2. The application of the amendment by both courts below is obviously correct. The six-months' grace period would be meaningless unless it were intended that at the end of that delay the statute would apply to Government cases already ended (a consideration Judge Hand treated as determinative, 274 F. 2d at 610). This explanation of the grace period is that which Judge Hand thought "patently appears" (274 F. 2d at 610) from the statements made about the statute in both the House and the Senate (set forth in part only by petitioner). All other cases considering the point are in accord with the result here. *April* v. *National Cranberry Association* 168 F. Supp. 919 (D. Mass. 1958); *Muskin* v. *United Shoe Machinery Corp.* 167 F. Supp. 106 (D. Md. 1958); *LaRouche* v. *United Shoe Machinery Corp.* 166 F. Supp. 633 (D. Mass. 1958); *Goodfriend* v. *Kansas City Star Co.* 158 F. Supp. 531 (WD Mo. 1958); *Solinski* v. *General Electric Co.* 149 F. Supp. 784 (D. NJ 1957); cf. *Fleischer* v. *A. A. P.* 180 F. Supp. 717 (SDNY 1959). One case was decided otherwise by a district court, and was reversed on appeal. *United Shoe Machinery Corp.* v. *International Shoe Machinery Corp.* 275 F. 2d 459 (CA 1 1960).

3. There is not the faintest need for "two lengthy trials . . . for this and similar cases" (petition p. 10) under the decision as affirmed. The extent of the permissible damage period having been defined, the cases will proceed to trial and judgment in the usual manner. Nor does the Court of Appeals' opinion "conflict squarely" (petition p. 10) with generally accepted rules of statutory construction. Judge Hand cited, observed and applied the cases cited by petitioner to the point that although "retroaction" with no form of relief may sometimes be repugnant, no difficulty is presented where ap-

propriate delay is provided for the saving of rights before the statute takes effect.

In considering petitioner's construction it should be remembered that this action was not brought until almost a year and a half after the Federal four-year statute took effect with its related express tolling provision. The old tolling technique petitioner refers to (petition p. 9) was not a part of the laws of the United States when this action was commenced, having been erased from the books by the amendment of July 7 1955 effective January 7 1956. A six-month delay was provided, which petitioner chose to disregard. He now asks that the law move backwards for his benefit to resume a method found unsatisfactory and expressly rejected by Congress long before he sued.

The effect of petitioner's claim is that the Congressional enactment of 1955 operated not to *limit* him to four years but to *enlarge* by first one year and then more (under wartime tolling) the time he would have had to sue until by virtue of the amendment he can recover for events happening over 15 years before he sued (petition p. 17). Of this sinuous argument, it is enough to say that it has been described as "entirely without merit" by a district court in Massachusetts,[3] rejected as "contrary to the plain wording of the statute" by a district court in New York,[4] and dismissed as "certainly not true" by Judge Learned Hand in the decision below.

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[3] *LaRouche* v. *United Shoe Machinery Corp.* 166 F. Supp. 633 (D. Mass. 1958).

[4] *Fleischer* v. *A. A. P., Inc.* 180 F. Supp. 717, 724 (SDNY 1959).

Conclusion

THE WRIT SHOULD BE DENIED.

Respectfully submitted,

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